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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/534,133	06/01/2005	Malcolm Tom McKechnie	102792-450 (10477P1)	2800

27389 7590 03/30/2010

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EXAMINER	
AHMED, HASAN SYED	

ART UNIT	PAPER NUMBER
1615	

MAIL DATE	DELIVERY MODE
03/30/2010	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/534,133	MCKECHNIE, MALCOLM TOM	
	Examiner	Art Unit	
	HASAN S. AHMED	1615	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *28 October 2009*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1,2,5-8,11-13,15,19 and 22-28* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1,2,5-8,11-13,15,19 and 22-28* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Receipt is acknowledged of applicant's amendment and remarks, filed on 28 October 2009.

* * * * *

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1, 2, 15, and 19, are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claims contain subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor, at the time the application was filed, had possession of the claimed invention. In the remarks filed on 28 October 2009, applicant cites paragraph [0073] for support for the newly added limitation "wherein the third phase is configured to shrink slowly only to permit vaporization of the second phase once the first phase has been exhausted". Paragraph [0073] is a description of the article of figure 5. However, the embodiment of figure 5 is not currently claimed. Rather, claim 1 corresponds to the embodiment of figure 2 and claim 2 corresponds to the embodiment of figure 6. With respect to figures 2 and 6, the disclosure does not provide the description, "wherein the third phase is configured to shrink slowly only to permit vaporization of the second phase once the first phase has been exhausted". As

such, examiner respectfully submits that written description for this newly added limitation insufficient vis-à-vis the claims as currently constructed.

* * * * *

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 1, 2, 5-8, 11-13, 15, 19, and 22-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 5,139,864 ("Lindauer") in view of U.S. 2003/0091466 ("Benko"), further in view of WO 94/23765 ("Duterloo"). All references are cited in applicants' IDS filed on 6 May 2005.

Lindauer teaches a multilayer volatizable substance delivery article (*see* col. 2, line 62 – col. 3, line 18). The disclosed article is comprised of:

- a first phase consisting of a vaporizable agent (i.e. pockets of perfume material) as recited by instant claims 1 and 2 (*see* col. 9, lines 26-35, figure 11 (107));
- a second phase consisting of a second vaporizable material, as recited by instant claims 1 and 2 (*see* col. 9, lines 37-43; figure 11 (103));
- a third phase which constitutes a barrier between the first and second phases, as recited by instant claims 1 and 2 (*see* col. 9, lines 31-35; figure 11 (101);

- the commencement of vaporization of the second phase being delayed by the third phase and the flowing of the second phase around the third phase, as recited by instant claims 1 and 2 (*see* col. 7, line 65 – col. 8, line 4; figure 2);
- the shrinking of the third phase, as recited by instant claim 1 (*see* col. 7, line 65 – col. 8, line 4; figure 2);
- the third phase being the gel, as recited by instant claims 1 and 2 (*see* col. 9, line 37; figure 11 (101));
- a fragrance (*see* col. 2, line 64);
- an insect repellant (*see* col. 2, line 65);
- the third phase being the evaporable agent (*see* col. 7, lines 64-68; figure 2); and
- the third phase being the gel whose volume reduces when exposed to air as recited by instant claims 1 and 2 (*see* col. 7, lines 64-68; figure 2);

Lindauer explains that a multilayer multifunctional volatizable substance delivery article is beneficial because it can deliver different substances (i.e. different aroma profiles) to the environment in a sequentially timed fashion (*see* col. 2, line 66 – col. 3, line 5).

The Lindauer reference differs from the instant application in that it does not teach the first or second phases to be liquid or gel phases.

Benko, et. al. teach an apparatus for releasing fragrance (*see* paragraph 0023). The apparatus may comprise multiple liquid or gel phases (*see* paragraph 0027, figure 3).

The Lindauer reference differs from the instant application in that it does not teach the partition wall of instant claim 1. Dunterloo teaches an article comprising an upper liquid (*see* page 7, lines 7-14, fig. (2)), a different lower liquid (*see* page 7, lines 7-14, fig. (4)) and a third liquid (*see* page 7, lines 7-14, fig. (10)), which differs from the upper and lower liquids. The article comprises an inner holder (*see* page 7, lines 7-14, fig. (1)) comprising walls which separate the upper liquid and lower liquid from liquid (10), and which extend into liquid (10), reading on the partition wall of instant claim 1.

The Lindauer reference differs from the instant application in that it does not teach the limbs of instant claim 2. However, these limitations are deemed to be a matter of engineering design choice, and thus do not serve to patentably distinguish the claimed subject matter over the prior art. *In re Kuhle*, 526 F. 2d. 553, 188 USPQ 7 (CCPA 1975).

The Lindauer reference is silent with respect to the mixing or migrating of phases recited in instant claims 1 and 2, as well as the evaporation properties of instant claims 15 and 19. Applicant's article is the same as the prior art. It contains the same components in the same configuration. Properties are the same when the structure and composition are the same. Thus, burden shifts to applicant to show unexpected results, by declaration or otherwise. *In re Fitzgerald*, 205 USPQ 594. In the alternative, the claimed properties would have been present once the composition was employed in its intended use. *In re Best*, 195 USPQ 433.

It would have been obvious to a person of ordinary skill in the art at the time the invention was made to make a vapor releasing article comprising a first phase, a

second phase, and a third phase, which constitutes a barrier between the first and second phases, as taught by Lindauer, in view of Benko, further in view of Dunterloo. One of ordinary skill in the art at the time the invention was made would have been motivated to make such an article because it can deliver different substances (i.e. different aroma profiles) to the environment in a sequentially timed fashion, as explained by Lindauer.

* * * * *

Response to Arguments

Applicant's arguments filed on 28 October 2009 have been fully considered but they are not persuasive.

Applicant argues that the instant claims differ from the cited prior art references in that the claims now require that the first phase be completely exhausted before the second phase begins to vaporize.

As explained in the 35 USC 112 rejection above, written description is insufficient in the instant disclosure with respect to this newly added limitation and the claims as currently constructed, since the newly added limitation is only described with respect to the embodiment of figure 5, while the instant claims correspond to the embodiments of figures 2 and 6.

All other arguments were discussed in the previous Office action.

* * * * *

Conclusion

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

*

Correspondence

Any inquiry concerning this communication or earlier communications from the examiner should be directed to HASAN S. AHMED whose telephone number is (571)272-4792. The examiner can normally be reached on 9am - 5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Robert A. Wax can be reached on (571)272-0623. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/H. S. A./
Examiner, Art Unit 1615

/Humera N. Sheikh/
Primary Examiner, Art Unit 1615